## STATE CORPORATION COMMISSION.

### IN RE APPLICATION OF TIDEWATER AND WESTERN RAILROAD COMPANY FOR A CERTIFICATE OF DISSOLUTION.

1. **Corporations—Dissolution—Rights of Public.**—The only persons who are interested in the dissolution of a private corporation are the stockholders and the creditors, but when it is proposed to dissolve a public service corporation the rights of the public become a question of great moment; the property of such a corporation being affected with a public interest.

2. **Corporations—Railroads—Rights of Public.**—The duties and obligations which arise when a railroad corporation obtains from the state a charter, secures from the counties special appropriations and utilizes the power of eminent domain for the accomplishment of its purposes, are of such an imperative and binding character that the courts have been careful to protect the rights of the public in such corporations. While the obligation to serve the public is voluntarily assumed, once this obligation has been established, it is subject to public regulation, and its public duties are imposed by law.

3. **Corporations—Abandonment of Service—Jurisdiction of Corporation Commission.**—The Corporation Commission has jurisdiction over a public service corporation when it desires to abandon its service either partially or totally, and in such case the corporation must apply to the Commission for permission to do so.

4. **Railroads—Powers—Eminent Domain—Tolls for Transportation—Taxation.**—There are two governmental functions which are always conferred upon railroads by law: First, the sovereign power of eminent domain, or the right to take private property for the uses of the railroad, and second, the right to charge tolls for the transportation of persons and property. In many cases railroads are also allowed to avail themselves of the sovereign power of taxation.

5. **Railroads—Public Highway—Regulation.**—Since a railroad is a public highway, and is created for public purposes and performs a function of the State, it would seem to follow that the operation of such a public highway is a governmental function, to be exercised by the State, or through agents permitted by the State to exercise this governmental function.

6. **Corporations—Corporation Commission—Statute Divesting Power.**—Any statute which has for its purpose the divesting of the power of the Corporation Commission over railroad corporations in their public relations must show the intention of the legislature in no uncertain terms.

7. **Corporations—Abandonment of Service—Notice.**—A public service corporation can not abandon its service without reasonable

notice to the public. No general rule may be laid down as to what constitutes such notice; reasonable notice in a particular case depending upon the character of business.

**8. Corporations—Dissolution—Construction of Statute.**—Section 30, of Chapter V of the Act Concerning Corporations (Virginia Code, § 1105e, clause 30), as amended by the acts of 1906, page 576, purporting to allow all corporations by a vote of two-thirds of their stockholders after due notice, or by a vote of all their stockholders without notice, to dissolve such corporations and cancel their franchises, is not applicable to public service corporations. And even if the statute embraces within its terms such corporations it cannot be construed to allow a railroad corporation to dissolve and abandon its franchises and its duties to the public without permission from the Corporation Commission, after notice to the public and an inquiry into the facts.

**9. Corporations—Corporation Commission—Statute Imposing Ministerial Function.**—No mere ministerial function imposed upon the Corporation Commission can be given the effect of abrogating and taking away its plain constitutional prerogatives.

**10. Corporations—Railroads—Dissolution during Receivership.**—When a railway corporation has voluntarily sought the aid of a court of equity, and its property has been put by the court in the hands of a receiver, such corporation has put it out of the power of stockholders to dissolve its charter, and it would be improper for the Corporation Commission to enter an order dissolving the same.

**11. Corporations—Franchise—Receivership.**—The franchise of a corporation is an asset in the hands of the receiver subject to sale for the benefit of the stockholders and creditors.

**12. Corporations—Railroads—Receivership—Eminent Domain.**—In the case of a railroad a receivership does not dissolve the corporation and after receivership it may maintain condemnation proceedings.

**13. Corporations—Corporation Commission—Nature and Powers.**—The Corporation Commission derives its authority from the Constitution of Virginia and is vested with powers both legislative and judicial. It is the department of government through which is carried out the provisions of the Constitution and of the laws made in pursuance thereof for the control of corporations. It can in no case be considered a mere misinterial body. (Per Wingfield, Commissioner.)

**14. Corporations—Dissolution—Constitutionality of Statute.**—The act of 1906, p. 576, purporting to amend section 30 of Chapter V of the Act Concerning Corporations (Va. Code, § 1105e, clause 30), so as to provide a method of formal dissolution of "any corporation" is unconstitutional, void and of no effect; because, First, if it be construed to apply to public service corporations its effect will be to take away from the Corporation Commission all effective

power for the regulation and control of such corporation. Second, because it can be used to conflict with the commerce clause of the Constitution of the United States. Third, because it reverses completely the policy of the state in regard to continued operation of railroad corporations for the benefit of the public. Fourth, because it is in direct conflict with the provision of the Constitution of Virginia that no law shall embrace more than one object, which shall be expressed in its title. (Per Wingfield, Commissioner.)

**15. Statutes—Constitutionality—Power of Corporation Commission.**—The Corporation Commission has the power to declare an act of the legislature unconstitutional. (Per Wingfield, Commissioner.)

OPINION BY C. B. GARNETT, CHAIRMAN.

On Thursday, May 10th, 1917, an application was presented to the Commission purporting to be signed by all the stockholders of Tidewater and Western Railroad Company for a dissolution of said corporation. As the paper presented was defective as to signatures another application was made on Saturday, May 12th, 1917. This paper was signed in two places as follows: "John L. Williams & Sons," but neither signature purporting to be by any agent or member of the firm of J. L. Williams & Sons; therefore the Chairman of the Commission notified counsel that the signature should be by the individual members of the firm. Accordingly, on Thursday, May 17th, 1917, the paper was presented signed by L. M. Williams, E. L. Bemiss and Berkeley Williams, partners, trading as John L. Williams & Sons.

In response to a letter of inquiry addressed by the Chairman of the Commission, Mr. E. Randolph Williams, counsel for the Tidewater and Western Railroad Company, under date of May 14th, 1917, wrote the Chairman a letter, informing him that his company had made a contract for the sale of a portion of the road's property, including the rails. It thus appearing that the road's purpose was to dismantle its line, and to put itself in a condition where it could not fulfil its public service, and that the application for dissolution was made to carry out this policy, the Commission on said May 14th, 1917, entered the following order:

"WHEREAS, From a letter dated May 14th, 1917, signed by E. Randolph Williams, Counsel, Tidewater & Western Railroad Company, and addressed to the Chairman of this Commission, it appears that the Tidewater & Western Railroad Company has entered into a contract for the sale of a considerable portion of the property of the said corporation, including the rails of said corporation, thus depriving itself of its ability to perform the public duty laid upon it by law; and

"WHEREAS, The said Tidewater & Western Railroad Company

has filed in this office an application for a dissolution which the Commission is advised has not been signed by all of the parties required by law to sign the same, which said application is now pending and undetermined; and

"WHEREAS, It appears from said letter that the board of directors has passed a resolution ordering that the operation of the railroad shall be discontinued from twelve o'clock midnight on May 12th, 1917;

"NOW, THEREFORE, The State Corporation Commission of Virginia doth order, adjudge and require that the said Tidewater & Western Railroad Company, its directors, officers and agents shall not, under penalty, sell or otherwise dispose of, nor shall it remove or cause to be removed either the rails, ties, or other fixtures of the said Tidewater & Western Railroad, and that it shall not remove or cause to be removed or permit to be removed any portion of the rolling stock of said company, and that it shall do no act which shall deprive the said company of the power to perform its public functions.

"IT IS FURTHER ORDERED, That the said Tidewater & Western Railroad Company, its directors, officers and agents shall not, under penalty, discontinue the service heretofore rendered to the public by said corporation, but that the said corporation, its directors, officers and agents shall continue to operate its trains under the same schedules as heretofore filed in the office of the State Corporation Commission until the further order of this Commission."

The discontinuance of service on the part of the Tidewater and Western Railroad Company was entirely without notice to the public and without any application to this Commission for permission to discontinue or abandon the service.

On the 14th day of May, 1917, the Chancery Court of the city of Richmond, in the chancery cause of Tidewater & Western Railroad Company, Plaintiff *v.* Richmond Trust & Savings Company, Trustee, Defendant, entered an order at the instance of the complainant, Tidewater & Western Railroad Company, which is in words and figures as follows:

"This cause came on this day to be heard upon the bill of complaint this day filed and on the answer of the defendant thereto likewise this day filed as to the appointment of a receiver as prayed for in said bill of complaint and assented to in said answer and this cause is docketed and set for hearing. And upon motion of the complainant it is adjudged ordered and decreed by this Court that Langbourne M. Williams be and he is hereby appointed a receiver of this Court of the said complainant, Tidewater & Western Railroad Company, and of all lands, railway, assets and property generally described in the bill of

complaint herein, and all of the property of complainant, real and personal, of whatever kind and description, and wherever situated. That the said receiver be and he is hereby fully authorized, empowered and directed to take immediate possession of all and singular the property above described or referred to, wherever situated or found, and to preserve and protect the said property in proper condition and repair and to protect the title and possession of the same, and in his discretion to employ and discharge and fix compensation of such employees as shall be necessary to aid in the proper discharge of his duties. And that he with all convenient speed ascertain and report the state, condition and circumstances of the property including an accurate inventory thereof, and of the debts and liabilities charged thereon or owing by the said complainant corporation, and of the nature of the security as to each indebtedness. And he is hereby authorized to collect such sums as may be due to the said company.

"And it is further adjudged, ordered and decreed that said receiver be and he is hereby authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property and trusts hereby vested in him, and likewise to defend all such actions instituted against him as such receiver, and also to appear in and conduct the prosecution or defense of any action, proceeding or suit now pending in any court or before any officer, commission or tribunal, the prosecution or defense of which will in the judgment of said receiver be necessary for the proper protection of the property or business placed in his charge.

"It is further ordered that said receiver be hereby directed to deposit the moneys coming into his hands in the Richmond Trust & Savings Company, Richmond, Va.

"It is further ordered that said receiver give bond in the penalty of ten thousand dollars ($10,000) conditioned that he will well and truly perform the duties of his office and duly account for all moneys and properties which may come into his hands and abide by and perform all things which he may be directed to do, with sufficient surety to be approved by the Clerk.

"It is further ordered that each and every of the officers, agents and employees of said complainant corporation and all other persons and corporations whatsoever, be and they are hereby commanded forthwith upon command of said receiver or his duly authorized agent to turn over and deliver to said receiver or his duly authorized representatives all books of account, papers, deeds, moneys, locomotives, cars, equipment, tools machinery, assets or other property of any kind in his or their hands or under his or their control.

"It is further ordered that the said Tidewater & Western Railroad Company and its officers and directors, agents and employees thereof, and all other persons claiming to act by, through or under said corporation, and all other persons or corporations whatsoever, are hereby enjoined and restrained from interfering in any way whatsoever with the operation or management of any part of the property over which said receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties as such receiver.

"It is further ordered that the said receiver shall retain possession and continue to discharge the duties and trust aforesaid until the further order of this court in the premises; and that he shall from time to time make report of his doings in the premises and may from time to time apply to this Court for such other and further order and direction as he may deem necessary to the due administration of said trusts."

The above statement of facts raises many questions, the most important of which is whether, under the laws of the State of Virginia, a railroad corporation may abandon its service without notice to the public and without application to the State Corporation Commission for permission to do so. In discussing this question it will be necessary for us to decide whether section 30, of Chapter V of the Act Concerning Corporations (Virginia Code, sec. 1105e, clause 30), as amended by the acts of 1906, page 576, purporting to allow all corporations by a vote of two-thirds of their stockholders after due notice, or by a vote of all their stockholders without notice, to dissolve such corporations and cancel their franchises, is applicable to public service corporations. And if we decide that said section is applicable to public service corporations, it will be necessary then to decide whether the object of said section was to allow a railroad corporation to dissolve and abandon its franchises and its duties to the public without an inquiry before the State Corporation Commission.

[1, 2] When the stockholders of a private corporation desire to dissolve such a corporation, the only persons who are interested therein other than the stockholders are the creditors, and our statute carefully protects the rights of creditors of private corporations, but when the stockholders of a public service corporation propose to dissolve the same, immediately the rights of the public in such a corporation become a question of great moment.

The Tidewater and Western Railroad Company was chartered by the State Corporation Commission on the 30th day of June, 1905, under the provisions of the Act Concerning Corporations, as the purchasers of the franchise and property of the Farmville

& Powhatan Railroad Company, and said corporation was specially made "subject to all the limitations, restrictions and liabilities imposed upon said Farmville & Powhatan Railroad Company."

By the provisions of the act approved March 3rd, 1884 (Acts 1883-4, Chap. 233, page 290), the Farmville & Powhatan Railroad Company was incorporated for the purpose of locating, constructing and maintaining and operating a railroad from Farmville to Moseley's Crossing.

By the acts of 1885-6, Chap. 78, page 65, the legislature authorized a subscription by the counties of Cumberland and Powhatan to the stock of the said Farmville & Powhatan Railroad Company, and by the acts of 1887, Chap. 10, page 8, the legislature authorized the town of Farmville to vote a subscription to the Farmville & Powhatan Railroad Company.

By the acts of 1887-8, Chap. 471, page 546, the legislature consolidated the Brighthope Railroad Company with the Farmville & Powhatan Railroad Company.

By the acts of 1889-90, Chap. 14, page 18, an act was passed authorizing the county of Powhatan to change the form of its subscription of forty thousand dollars to the capital stock of the Farmville & Powhatan Railroad Company from conditional bonds to coupon bonds.

By an act approved March 4th, 1890, acts 1889-90, Chap. 519, page 882, an act was passed to allow the Farmville & Powhatan Railroad Company to pass across the streets of the village of Powhatan Court House, and to vest the title to right of way in said company.

It was stated in the argument before the Commission, and not denied, that the total amount of subscriptions to the stock of the Farmville and Powhatan Railroad Company by the town of Farmville and the counties of Powhatan and Cumberland was one hundred and thirty thousand dollars, and that the great majority of this sum was represented by subsisting obligations of the said town and counties.

Thus it would seem that this corporation or its predecessor in title not only had the usual privileges of a public service corporation but it had also received special aid from the counties traversed by it in the form of subscriptions to its stock, or, in other words, it has availed itself of the taxing powers of the State and that it has been given the right to traverse the public roads of the Commonwealth.

The duties and obligations which arise when a railroad corporation obtains from the State a charter, secures from the counties special appropriations, thus availing itself of the taxing power of the State, and utilizes the sovereign power of em-

inent domain for the accomplishment of its purposes, are of such an imperative and binding character that even before our new Constitution and the establishment of the State Corporation Commission, the courts have been careful to protect the rights of the public in such corporations, and it has always been held that the property of such a corporation is affected with a public interest. The fundamental fact with reference to such corporations is the public duty which results in all cases from the profession of a public calling. While the obligation to serve the pubic is voluntarily assumed, once this obligation has been established, it is subject to public regulation, and its public duties are imposed by law.

It has been strongly contended before the Commission in behalf of the Tidewater & Western Railroad Company that the effect of our statute is to allow a railroad or other public service corporation, whenever two-thirds of the stockholders shall assent thereto, not only to dissolve the corporation but to abandon the service and the obligations owed to the public, without any inquiry on the part of the State Corporation Commission or any part of the State Corporation Commission or any court of the Commonwealth as to the right of such corporation to abandon the service. The consequences which will follow from such a holding are so serious that we must be very sure of our ground before we can give such a construction to our statute. If a railroad or other public service corporation, by the mere consent of two-thirds of its stockholders filed with this Commission, can thereby relieve itself of its obligation to the public, then our economic structure is on a shallow foundation and the welfare of every county and every municipality which is served by a public service corporation is at the mercy of the whim of such stockholders. Not only is the public interest in this question of vital moment, but the bondholders, who have taken the bonds of a public service corporation upon the faith that it will continue its service, may be deprived of the security which the going concern gives to them. In other words, if our statute is applicable to public service corporations and be construed as contended for by the counsel for the applicant, the mere filing of a consent in the office of the State Corporation Commission works *ipso facto* a revocation of the charter and authorizes an abandonment of service, and the State Corporation Commission has no power to inquire into the question as to whether the public service corporation should be allowed to abandon its service irrespective of what may be the damage to the public.

Under the express provisions of section 156b of the Constitution, the Commission has the power, and is charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State in

all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies, and to that end the Commission is authorized to prescribe and enforce against such companies such rules and regulations, and to require them to establish and maintain all such public service facilities and conveniences as may be reasonable and just.

Under the terms of the enabling act, Virginia Code 1904, section 1313a, it is made the duty of the Commission to make inquiry and examination from time to time into the acts and proceedings of railroads and other transportation companies doing business in this State for the purpose of ascertaining whether anything has been done or omitted in violation or contravention of their charter or of the law, and it is further provided that the Commission shall keep itself informed whether the railroads and other transportation companies are operating with reference to the security and accommodation of the public and the compliance of the several companies with the provisions of their charters and the laws of the Commonwealth, and the provisions of this section are made applicable to all railroads and other transportation companies, and to the corporations, trustees, receivers, or other person owning or operating the same. (Section 1313a, clauses 17 and 18.) It is further provided that whenever, in the judgment of the Commission any transportation or transmission company has violated any law of this State, or has neglected in any respect or particular to comply with the terms of its charter or provisions of any laws of the Commonwealth, it shall give notice thereof in writing to said company, or the person operating the same, and if the violation or neglect be continued after such notice, the Commission is required to take such proceedings, and impose such fines or penalties within its jurisdiction as shall be necessary to compel such transportation or transmission company to comply with the terms of its charter and the provisions of the laws of the Commonwealth.

By the provisions of section 1294d, clause 2, it is made the duty of railroad companies to transport persons and property on same, and the company is given exclusive right of transportation on its road, and required, upon the payment or tender of lawful rates of toll or charge, to transport to and deliver at any depot or other regular stopping place indicated by the owner of such articles as shall be delivered or offered at any depot or receiving place in proper condition to be transported, and by the provisions of clause 48 of section 1294d no railroad company which has established and maintained a passenger station for five consecutive years is allowed to abandon such station without the written consent of the Corporation Commission.

Despite the many and binding obligations laid upon transpor-

tation companies and the large powers conferred upon the Corporation Commission to require transportation and transmission companies doing business in this State to comply with the terms of their charter and with the laws of this State, it necessarily follows that, if the contention of the counsel for the Tidewater and Western Railroad Company is correct, the obligations and duties of transportation companies can all be laid aside and the powers of the Commission nullified by the mere application of two-thirds of the stockholders of such a corporation for a dissolution.

[3] The question here raised involves the further question whether the Corporation Commission of the State of Virginia has jurisdiction over public service corporations when they desire to abandon their service. We are firmly of the opinion that the Constitution and laws of this State have put upon this Commission the obligation and the duty to inquire into the facts when any public service corporation desires to abandon its service, whether partial or total, and that a correlative obligation is laid upon the public service corporations, whenever they desire to abandon service either partially or totally, to apply to this Commission for permission.

Under a statute of Kansas, which provided that no charge shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier without the consent of the Commission, the Kansas Public Utility Commission has held that no established service or practice pertaining to the service of any public utility can be varied, modified or discontinued without the consent of the Commission. N. E. Kansas Telephone Company *v.* Hiawatha Mutual Telephone Co., Public Utilities Reports, 1915A, 1016.

Under a statute (which conforms in every essential feature to our statutes) with reference to the powers of the Kansas Public Utilities Commission, the Kansas Supreme Court has held that the statutes of Kansas have conferred upon the Public Utilities Commission the power and authority and jurisdiction to pass upon the question as to whether a telegraph station established and maintained should be abandoned, and that the power thus granted is a valid exercise of governmental supervision, and does not contravene either the national or state constitutions. State *v.* Kansas Postal Telegraph Cable Co., Public Utilities Reports 1915E, 222, 150 Pac. 544.

In discussing the question as to whether the law of Kansas required the defendant to obtain the consent of the Public Utilities Commission before discontinuing its service, the Kansas Supreme Court, after citing the statutes, goes on to say:

"It will be seen from the foregoing statutes that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The Public Utilities Commission * * * has power to supervise the conduct of public service corporations in this Commonwealth. It may order improvements in the public services where conditions so demand. * * * The rates of gas supplied by a public service company can not be changed without the consent of the Public Utilities Commission. * * * Examining these statutes, which are all in pari materia, it will be noted that the Commission has power to inquire into any neglect or violation of law by a corporation engaged in the transportation of property. * * * Continuing this examination of later enactments, we find the Commission vested with full power, authority and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority and jurisdiction. That is to say, whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred. * * * Section 20 is also quite pertinent. It provides that, if a public utility desires to change any rule, regulation, or practice, it shall apply to the Commission for leave to change such practice, etc. And no change in such practice shall be made without the sanction of the Commission. In view of all these, can there be any doubt of the duty of the defendant, before dismantling its station at Syracuse and abandoning its business thereat, to secure the approval of the Commission for such an important change in its mode of service? How is the Public Utilities Commission to discharge its important duties if the public service companies may quit business here, there, or anywhere in the state without an opportunity for the Commission to determine the propriety of such a course?

"It is clear that, if the defendant may forego its business in Syracuse without the sanction of the Commission, it can close its office in Topeka, Wichita, or Kansas City, without the consent of the Commission. If this public utility, a telegraph company, can close one of its offices and quit business without the consent of the Commission, any other public utility, like the Santa Fe Railway, for example, could close its depot at Dodge City, Hutchinson, or Emporia without the consent of the Commission. Where would this end? If these utility corporations may abandon this particular service without the consent of the Commission, may they not take off their passenger trains, take up and abandon unprofitable branch lines, change the fares and rates of transportation for passengers and freight, or raise the charge for telegraph messages without the consent of the Com-

mission? These questions answer themselves. To yield approval to the contention of the defendant is to concede that the state's program for the regulation and control of public service corporations is ineffective; that the public utilities act has been enacted in vain."

It will therefore be seen that the contention of counsel for the Tidewater and Western Railroad Company, that any public service corporation has the option in Virginia to abandon its service without inquiry by the Commission, does not accord with the view by the Kansas Supreme Court in a similar case, and paraphrasing what was said by that court, to yield approval to the contenion of counsel for the Tidewater and Western Railroad Company is to concede that Virginia's program for the regulation and control of public service corporations is ineffective, and that the constitutional provisions and acts made in conformity therewith for the regulation of such corporations have been enacted in vain.

If we adopt the contention of counsel for the applicant, what effect would be given to that provision of the law which authorizes the Commission, whenever in its judgment it shall appear that any change in the mode of operating a road and conducting its business is reasonable and expedient in order to promote the security and accommodation of the public to require upon ten days' written notice such improvements and changes as it deems to be proper (section 1313a, clause 20)?

In Pana *v.* Central Illinois Public Service Company, Public Utilities Report 1916B, 177, it was held by the Illinois Public Utilities Commission that a steam heating utility could not discontinue service, although operated at a loss, where it had not applied for authority to increase its rates or for permission to discontinue, and had not given reasonable notice to the public. In discussing this case, Shaw, Commissioner, at page 179, used the following language:

"The Commission has power and authority to permit a public utility to discontinue serving the public where the conditions justify and demand it, and whether the conditions justify and demand it is a question that should receive full consideration upon a hearing by the Commission in proceedings instituted for that purpose. The consumers should have sufficient notice of the proceedings having been instituted and pending before the Commission, and the public in general which will be affected by the decision should be given sufficient information of such proceedings. The reasons for this are obvious.

"If the public utility is operated at a substantial loss, it no doubt is in a position to know this, and if it can not serve the public without loss at the rates being charged, it should apply to

the Commission for an increase of rates, if it desires such increase, and if it desires to discontinue serving the public, then it is incumbent upon it to apply to the Commission for permission to discontinue such service, and reasonable notice be given by it to the public that it will discontinue service if permitted to do so by the Commission, and that application has been or will be made in the Commission or such permission. The service should be continued until a hearing is had and the question determined in a proceeding instituted for that purpose.

"It is evident that the law does not intend that public utilities may abandon serving the public at any time they may wish to do so without any regard to the rights or interests of the public.

"In the case under consideration we find that the spirit of the law has not been complied with by the respondent in discontinuing heating service in the city of Pana, and that therefore it should resume the performance of its duty and furnish heat as it has previously been doing until the further order of the Commission."

See also sequel to this case in Public Utilities Reports 1916B, 920.

In Public Utilities Reports 1916F, page 351, there is a note on discontinuance of service, showing that the power of the utilities commissions of the States to inquire into matters of discontinuance of service have been exercised in California, Colorado, Louisiana, Michigan, New York, Washington, Illinois and Mississippi, and it may be worthy of notice that the Colorado Commission on April 13th, 1916, entered a general order, No. 15, that no electric street railroad, interurban railroad or steam railroad should discontinue its service or abandon its line or remove its track without having filed with the Commission written notice of its intention to discontinue, abandon, or remove its service or tracks.

There has been no case decided by the Supreme Court of Appeals of Virginia since the Constitution of 1902 relating to the power of the State Corporation Commission to inquire into the proposed abandonment by a railroad corporation either of a portion of its line or the whole line, but there is nothing in the Virginia cases cited to us which would militate against the proposition that the Corporation Commission has the power, and that it is its duty, to inquire into the right of a public service corporation to abandon its service either partially or totally.

In Southern Railway Co. *v.* Franklin, etc., R. Co., 96 Va. 693, the question was whether the defendant railroad company was bound to operate a road leased by it during the term of its lease, or whether it might rightfully abandon and cease to operate. The court held that the obligation to maintain and oper-

ate the road during the term of the lease was a necessary implication from the express stipulation, and, therefore, affirmed an order of the lower court which compelled the operation thereof.

In Sherwood *v.* Atlantic & Danville Railroad Co., 94 Va. 291, it was held that the purchaser of the railroad company under a decree in a suit brought to foreclose a mortgage on said railroad company was discharged from the performance of all contracts of the old company which did not constitute a lien on the property, and consequently where the old company had a contract with the city of Portsmouth to make that city its terminus it was not binding upon the purchaser in such a suit, but that the purchaser acquired the property and franchises of the original company discharged of the obligation growing out of the contract between the company and the city of Portsmouth. In the course of the decision of this case Judge Keith uses the following language, page 306:

"It may be asked, is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is likely to become so in the future. Where the line of railway, taken as a whole, can not be profitably maintained; where its operation, when discreetly and economically managed, is attended with loss, it is difficult to perceive how a court can, by mandamus or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned, and run it through the instrumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs there would seem to be no escape from its ultimate abandonment. Such cases are possible, though rare. It more frequently happens, however, that a part of the line becomes unprofitable, though the system as a whole may be valuable. In such an event the court will enquire, first, as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who make the complaint, and that the service which they receive is under all the conditions, reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon

the company far in excess of any benefit conferred, and which might in its ultimate effect embarrass or prevent the performance of other duties with respect to larger interests, and affecting a far greater number of citizens, the court will withhold its hands."

A careful reading of the language used above by Judge Keith will show that so far from holding that the right of a railroad company to abandon its service, either partially or totally, is absolute and unlimited a contrary inference must be made. The limitation upon the right to abandon is, first, it must be shown before a competent tribunal that the road, taken as a whole, can not be profitably maintained; second, at must likewise be shown that the management of the road has been discreet and economical; but the honored Judge goes on to state that if the loss is the result of improvident and unthrifty management, then the court might, at the suit of those interested, take charge of it for the benefit of all concerned. And it will be noted that so far as partial abandonment is concerned the position is taken that the *court will inquire* first as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, *the court will consider* all the circumstances of the case and act accordingly. This language shows clearly that Judge Keith never intended to hold that a railroad had the right to abandon all of its line or a part thereof without an inquiry into the method of its operation and a determination of all the facts necessary for a correct decision of the question. If this be true with reference to the powers of a court before our Constitution went into effect, how much more must it be true at this time, that before a public service corporation can abandon its service either partially or totally, application should be made to the State Corporation Commission for permission therefor?

[4, 5] There are two governmental functions which are always conferred upon railroads by law. First, the sovereign power of eminent domain, or the right to take private property for the uses of the railroad, and second, the right to charge tolls for the transportation of persons and property. In many cases railroads are also allowed to avail themselves of the sovereign power of taxation. The reason why these powers have been conferred upon railroad corporations are fully stated in Olcott *v.* Supervisors, 83 U. S. 678. The question before the court was whether or not the State could lend its power of taxation in the aid of construction of railways. Those resisting the collection of the tax insisted that this was the loaning of the power of taxation

to a corporation for a private purpose, and, therefore, invalid. The court said, on page 694:

"The railroads can, therefore, be controlled and regulated by the State. Its use can be defined; its tolls and rates for transportation may be limited. Is a work made by authority of the State, subject thus to its regulation, and having for its object an increase of public convenience, to be regarded as ordinary private property? That railroads, though constructed by private corporations and owned by them are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. * * * And the reason why the use has always been held a public one is that such road is a highway, whether made by the Government itself or by the agency of corporate bodies. * * * No matter who is the agent, the function performed is that of the State. Though the ownership is private the use is public. * * * They (highways) have always been governmental affairs, and it has always been recognized as one of the most important duties of the State to provide and care for them. In their very nature they are public highways. It needed no decision of Courts to make them such. * * * A railroad built by a State no one claims would be anything else than a public highway, * * * though it could no more be open to public use than is a railroad built and owned by a corporation."

In Cherokee Nation *v.* Kansas Railway Co., 135 U. S. 641, at page 657, the court said:

"The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation."

In Louisville & Nashville Railroad *v.* Kentucky, 161 U. S. 641, at page 657, the court said:

"But it has been too often held that railways were public highways, and their functions were those of the State, though their ownership was private, and that they were subject to control, for the common good, to be now open to question."

And in the celebrated case of Smyth *v.* Ames, 169 U. S. 466, at page 544, the court said:

"A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State."

Since a railroad is a public highway, and since it is created for public purposes and performs a function of the State, it would seem to follow that the operation of such a public high-

way is a governmental function, to be exercised by the State, or through agents permitted by the State to exercise this governmental function. As was said in Olcott *v.* Supervisors, 83 U. S. 678, at page 695:

"The owners may be private companies but they are compellable to permit the public to use their works in the manner in which such works can be used. * * * A railroad built by a State no one claims would be anything else than a public highway justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation."

[6] If a railroad can be held to be a public highway in order to justify the State's conferring upon such a corporation the right to avail itself of the sovereign power of taxation, surely when such a corporation wishes to lay aside its public duties, the strong presumption is that the State will provide some means of protecting the rights of the public in such a public highway, and when the argument is presented that a statute has put in the hands of two-thirds of the stockholders the power to divest the property of such a corporation of its public nature without the power of any court or commission to inquire into the facts and protect the public, such argument must be based upon a clear, convincing and unmistakable expression of intention on the part of the legislature, and any statute which has for its purpose the divesting of the power of the State Corporation Commission over railroad corporations in their public relations must show the intention of the legislature in no uncertain terms.

That the State Corporation Commission has in the past acted upon the assumption that the Constitution and statutes defining its powers and jurisdiction and marking out the duties and limitations of public service corporations have given the State Corporation Commission jurisdiction over the question of abandonment of service is shown by orders which have been heretofore entered by the Commission.

In the case of the Mount Airy and Eastern Railway the Commission entered an order requiring this corporation to restore the tracks which had been torn up and to resume the service which had been totally abandoned.

In the matter of the application of the Newport News and Old Point Railway and Electric Company for leave to discontinue service on a certain portion of its line and to dismantle same by tearing up the track and taking away the poles and wires, the jurisdiction of this Commission was not questioned either by the petitioning railroad or by the city of Newport News, or the county of Warwick, which were parties to the proceedings; and we have recently entered an order compelling the restoration

by the Old Dominion Steamship Company of the service on James River which was abandoned without notice to the public or to this Commission.

The question now being discussed is not the right on the part of a railroad company ultimately to abandon its road, but simply relates to the proposition as to whether a railroad corporation may abandon its road without permission from this Commission, after notice to the public and an inquiry into the facts.

[7] It may be proper incidentally to refer to the fact that there seems to be some difference of opinion as to the right of a railroad corporation to abandon its road or a branch thereof. Wyman on Public Service Corporations takes the view that a railroad company, even though it has accepted extraordinary privileges may, if it is ready to give up its charter, withdraw from its entire undertaking. (Wyman on Public Service Corporations § 296). On the other hand, the learned editors of Lawyers Reports, Annotated, take the contrary view in L. R. A. 1915A, at page 549, where they say:

"The general rule seems to be that a railroad cannot abandon its road or a branch even though it may be operated at a loss, and cases which are apparently in conflict with this rule will be found to have turned on special circumstances that warranted the decision,"

citing Farmers Loan & T. Co. *v.* Henning, Fed. Cas. No. 4666, Talcott *v.* Pine Grove Township, 1 Flipp, 145, Fed. Cas. No. 13735, and Gates *v.* Boston & New York Air Line Railway Co., 55 Conn. 333, 5 Atl. 695. See, also So. R. Co. *v.* Hatchett (Ky.), 192 S. W. 694. See, also, note in Amer. & Eng. Ann. Cases 1914C, page 1271.

But it is not necessary for us at this time to reconcile these conflicting theories. Even if this corporation shall be entitled ultimately to abandon its service and its line, we are of opinion, as we have already indicated, that it can only do so after a hearing before the Commission and notice to the general public.

Mr. Wyman, who, as we have already seen, adopts the view that a public service corporation may withdraw from public service, takes just as positive a position that such withdrawal cannot be accomplished without notice to the public. See sections 314, et seq. In section 316 the learned author, in discussing the subject "Situation Requires Reasonable Notice," uses the following language:

"The parallel between entering public service and quitting it is not quite perfect; for although one may enter upon public service on public notice without preparing the public for his advent, one may not it seems abandon public service without notice to the public. The new element of a public duty now

existing has supervened, which must be reckoned with when one who has assumed a public employment would lay it down. Certainly the service in hand must be completed. An innkeeper cannot turn the guests he has accepted out into the night, nor the carrier abandon his passengers short of their destination. One may go further with confidence and say that an innkeeper could not without notice take down his sign at nightfall, nor, a carrier abandon his schedule without warning to his public. This means that there is a public duty in the matter to give reasonable notice of the intention to abandon, which they owe to the public; for they have given the public cause to rely upon the continuance of their service, although they may by reasonable notice leave their public to get service elsewhere. These general principles are sufficiently established to justify action; there are already several instances in the books of the granting of temporary orders to prevent a public company which had threatened cutting off suddenly an established service. And upon similar principles mandatory processes have been issued to compel an electric company to furnish temporarily a service from which it is conceded, it might ultimately withdraw."

From the above authority it seems clear that a public service corporation should not be permitted without notice to the public to abandon its functions.

The next question which it is necessary to consider is what constitutes reasonable notice. From an examination of the authorities it seems clear that no general rule may be laid down as to what constitutes reasonable notice in order to entitle a public service corporation to withdraw its service. Reasonable notice in a particular case seems to depend upon the character of business, and on this point Wyman, in section 317, uses the following language:

"It must be admitted, however, that little law as yet exists as to the length of the notice that must be given. But it may be asserted with confidence that what is reasonable notice in a particular case depends upon the character of the business. A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for the other opportunities for shippers over the canal are numerous. But a railroad company may not without a long notice abandon its line. And a gas company could abandon its service only after a long enough period to provide a new supply. It is not principally the special privileges which these service companies have received that makes their withdrawal difficult; it is because the duplication of these particular services takes a long time, and, therefore, the public is so dependent upon the established service that it

would lead to intolerable hardships if the proprietors were permitted to withdrawal without long notice. A rule of law to meet all conditions would have to go so far as to say that one cannot withdraw from public service without notice sufficiently long to enable those deprived of the service to make the necessary arrangements for the provision of other service."

[8, 9] It next becomes necessary to consider the effect of section 30 of Chapter V of the Act Concerning Corporations, section 1105e, clause 30, Virginia Code 1904, as amended by the acts of 1906, page 576.

It is perfectly clear that as section 30 originally stood prior to said amendment, it only related to the disposition of the property of private corporations, whose charters expired by their own limitation or were otherwise dissolved, and that said section did not relate to the methods of dissolution of public service corporations; for the Act Concerning Public Service Corporations (section 1294b, clause 16, Virginia Code 1904) treated of the subject of the disposition of the property of public service corporations upon dissolution, and clause 11 of Chapter I (Virginia Code 1904, sec. 1105a, (11) ) prescribed the method of dissolution of private business corporations.

But by the acts of 1906, page 576, section 30 of Chapter V of the Act Concerning Corporations was amended so as to provide a method of formal dissolution of "any corporation." It is strongly urged upon us by most able and exhaustive briefs on the subject that this amendment, though referring in terms to the method of dissolution of *any* corporation, must be limited to private corporations.

The purpose of the amendment was to write into Chapter V provisions similar in effect to those already applicable to private corporations in section 11 of Chapter I (section 1105a, clause 11, Virginia Code 1904).

After a most careful consideration of the able briefs which have been filed on this subject we have reached this conclusion—that, if section 30 as amended embraces within its terms public service corporations, it cannot be construed to abrogate the higher obligation put upon public service corporations by the Constitution and statutes of Virginia not to discontinue their service until permission therefor has been secured from the State Corporation Commission.

Nor was such statute intended to do away with the common law duty of a railroad to give reasonable notice to the public of its intention to abandon its service before such an abandonment thereof. In other words, before the Tidewater and Western Railroad Company can show that it is entitled of its own volition to tear up its line, sell its rails, and otherwise destroy

its ability to perform its duties as a public highway, and before it can divest the property owned and controlled by it of its public nature, it must first apply to this Commission, after public hearing and public notice, and prove by all the circumstances of the case its right to accomplish this end, and the statute must be construed either not to apply to a public service corporation, or, if applicable to public service corporations, it must be construed not to abrogate the higher duties and obligations put upon public service corporations by the Constitution and laws of the State of Virginia, and not to allow the owners of the stock of such corporations, without public hearing and without public notice, to divest themselves of all of their public duties, and to change in the twinkling of an eye the public nature of property owned by it.

This corporation has never been denied an application for a general increase of rates. It has made no application to this Commission for an increase of rates since 1914, and whether it is being economically and properly managed has never been inquired into in a judicial proceeding.

It is strongly urged upon us that not only is clause 30 aforesaid applicable to public service corporations, but that it contains all of the law relating to the dissolution of public service corporations and their right to abandon their service and destroy and dismantle the line; and that the act of the Commission in passing upon the application for a dissolution is merely a ministerial function. If this contention is correct, then the effect of the statute is to nullify the provisions of our Constitution relating to the powers and duty of the Corporation Commission over public service corporations; and the duties and obligations of public service corporations arising out of the Constitution and statutes, and the status of such corporations at common law have been nullified. In this view, the statute would be unconstitutional, and to this view we cannot assent; for no mere ministerial function imposed upon us by a statute can be given the effect of abrogating and taking away from us our plain constitutional prerogatives.

[10, 11] But even if we are incorrect in this view of the case, as this corporation did, of its own volition, three days before it presented a completed paper applying for a dissolution, make application to the Chancery Court of the City of Richmond for the appointment of a receiver, and as on said date the Chancery Court of the City of Richmond entered an order, as set out in full above, appointing a receiver, vesting him with the title tc all the property of any kind whatsoever owned by this corporation, and enjoining all persons from interfering with the property of this corporation, the corporation by its own action, vol-

untarily taken, has made it impossible for its stockholders to dissolve the corporation, and thus destroy one of the assets which belong to the receiver and which is the subject of sale in the hands of said receiver; and it would be improper for the State Corporation Commission of Virginia to enter any order dissolving a public service corporation in the hands of a receiver; for the franchise is an asset in the hands of the receiver subject to sale for the benefit of the stockholders and creditors.

In the matter of George Mather's Son's Company, 52 New Jersey Equity 608, the company was decreed to be insolvent and a receiver was appointed to take over its assets, sell the same, and pay into court the moneys arising from such sales or otherwise. Upon the appointment of the receiver the insolvent company was enjoined from collecting or disposing of its assets and from exercising its franchises. Subsequently, it being made to appear to the chancellor that the business of the company might be continued by the receiver with profit and to the enhancement of the value of the assets coming into his hands, he was authorized to continue the business of the company.

The attorney-general gave notice to the receiver that he would apply for an injunction to restrain the insolvent corporation from all further exercise of any franchise and transaction of any business in the State, because of its non-payment of the State franchise tax.

The attorney-general, however, did not make the receiver a party to his petition, but pressed his application for the injunction against the insolvent company.

It was held by the Court of Chancery, the chancellor rendering the opinion, that the receiver should have been made a party to the State's petition for injunction, since the entire assets of the company were in his hands and he alone was continuing the business of the company, and he acted as the representative of the creditors and stockholders of the company for the purpose of securing to them respectively their debts and the repayment of their capital out of the assets.

In the course of the decision the learned chancellor shows that a receiver does not in every case deal with the corporate entity or its franchise, but that in the case of public service corporations a receiver does take charge of and deal with the franchise. In deciding this point, the court said:

"A receiver does not necessarily in every case deal with the corporate entity or its franchise. His duty may be confined entirely to the administration of assets which exist at the time of his appointment. Our Corporation act contemplates two classes of insolvent corporations—(1) those of a public character, such as a canal, railroad or turnpike corporation, whose

property and work are dependent upon the franchise and in whose continuance the public is interested, and (2) those which are mere private enterprises, incorporated merely to secure the franchise which enables the prosecution of a lawful business, and at the same time protects against individual liability and serves convenience in adjusting changes in the ownership of the capital invested. In the former class, the franchise is taken by the receiver, kept alive by performance of corporate duties and ultimately sold. In the latter class, it may be, and, after insolvency, generally is, valueless, and no duty necessarily devolves upon the receiver to care for it. In the latter case, the receiver simply takes the assets of the corporation into his possession, protects them, discreetly reduces them to money and distributes that money as the court directs, first to the creditors, until their claims are satisfied, and then to the stockholders. Vanderbilt *v.* Central Railroad Co., 16 Stew. Eq. 669, 682.

"It follows, as to the first of these classes, from the receiver's duty to preserve the franchise, that he must pay the franchise tax from year to year until the franchise passes from him."

Here we have an express decision of the Court of Chancery of New Jersey that in that State the receiver of a public service corporation, whose property and works are dependent upon the franchise and in whose continuance the public is interested, always takes possession of the franchise and that such franchise is kept alive by performance of corporate duties and ultimately sold.

It may not be amiss to mention that the provisions of clause 30 of Chapter V relating to the voluntary dissolution of corporations, whether by two-thirds consent of the stockholders or by the unanimous consent, is taken directly from the New Jersey statute (see New Jersey Act Concerning Corporations, Revision of 1896, Section 31); and as we have seen above the New Jersey court holds that where a receiver is appointed for a public service corporation one of the assets of the receiver is the franchise which he should keep alive by paying the franchise tax.

In Gilbert *v.* Washington City, Virginia Midland & Great Southern Railroad Co., 33 Gratt. 586, our court took the same view of this question as was taken by the New Jersey court in the case last cited. Judge Christian delivered an able and exhaustive opinion, in the course of which it was held that any act for the protection and preservation of the property of a railroad corporation is legitimate and proper for the receiver to do, and that, accordingly, a receiver was authorized to preserve the property and give it additional value, not only for the benefit of the lien creditors, but also for the protection of the com-

pany, whose possession the court had displaced by the appointment of a receiver and by taking into its hands the property, rights, works and franchises of the company.

In the course of his opinion Judge Christian said, page 603:

"A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary within its corporate power to preserve the property, and to give to it additional value, not only for the benefit of the lien creditors, but also for the benefit of the company, whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and franchises of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation, will always be upheld and enforced by the courts. 4 Otto U. S. R. 734 (Jerome *v.* McCarter); Wallace *v.* Loomis, 7 Otto U. S. R. 146, 162."

Thus it seems clear that our court has specifically endorsed the proposition that a receiver should take into his own hands the franchises of a railroad corporation, and do whatever is necessary to protect these franchises.

[12] In this connection it may be noted that in the case of a railroad a receivership does not dissolve the corporation and that on the contrary, after receivership, a railway company may maintain condemnation proceedings. High on Receivers, 4th Edition, section 370b. And the courts have even gone to the extent of appointing receivers to prevent the forfeiture of a franchise of a street railway company because of its failure to comply with the conditions of the ordinance under which it was operating. Union Street Railway Co. *v.* City of Saginaw, 115 Mich. 300, 73 N. W. 243.

From these considerations it seems clear that when a railway corporation has voluntarily sought the aid of a court of equity, and its property has been put by the court in the hands of a receiver, such corporation has put it out of the power of stockholders to dissolve its charter, and it would be improper for the State Corporation Commission to enter an order dissolving the same.

The application of the stockholders of this corporation for a dissolution is therefore refused, and an order will be entered accordingly.

CONCURRING OPINION BY J. R. WINGFIELD, COMMISSIONER.

I read the able opinion written by the Chairman, Mr. Garnett,

and advised him that I fully concurred in the conclusions reached by him, and that I thought the order he had prepared should be entered forthwith. I reserved the right, however, to file a separate opinion setting out the reasons why I reach the same conclusion.

The citations from decisions of the courts and from public utility reports of other States made by the Chairman in his opinion are illuminating and conclusive, establishing the proposition that a railroad is a public highway, and though the ownership is private the use is public, and being established for the use of the people and to subserve public ends, is therefore subject to government control and regulation.

[13] The Corporation Commission of Virginia derives its authority from the Constitution of Virginia, while some regulative bodies in other States derive their authority only from statutory enactment. The Virginia Commission is vested by Constitutional provision with powers both legislative and judicial. It is made the department of government through which shall be carried out the provisions of the Constitution and of the laws made in pursuance thereof for the control of corporations. The Constitution, sec. 156a provides:

"The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies."

Under the provisions of Chapter XII of the Constitution making the Commission a department of government, in no case can this Commission be considered a mere ministerial body. It was created for the protection of the public and for the control of corporations, and whatever action it may take in any given case it must consider both the interests of the private persons whose money is invested in railroads and the interests of the public.

[14] In the case at bar we were asked to issue a certificate of dissolution of the Railroad Company, to take effect at once, without notice and without any consideration of the interests of the public doing business in the territory through which the railroad runs, and without any consideration of the large amount of money subscribed by the counties and towns for the building of this railroad. In a word, the Commission was asked to countenance and authorize the destruction of the franchise value of the property and convert the rails and rolling stock into scrap or junk, in order that the private investors might accomplish their avowed purpose of selling the same at the prevailing high prices brought about by the European War, into which the United States has recently entered.

If this Railroad Company can by the mere action of its stockholders dissolve itself, the Corporation Commission acting merely in a ministerial capacity to enter up the record, then any other public service corporation can so dissolve itself. The Seaboard Air Line Railway, or any other interstate railroad which obtained its charter from Virginia, can act likewise. Street car lines operating in the different cities of the State can do the same. All transmission companies chartered in Virginia can do the same. It is inconceivable that the Legislature of 1906, which adopted the so-called amendment to Section 30 of Chapter V of the Act entitled "An Act Concerning Corporations" contemplated or intended such results. The Journal of the House and Senate show it was passed in the closing days of the session and was signed by the Speaker of the House on the last day of the session, the 15th of March, 1906. To guard against hasty and ill-advised legislation, Section 52 of the Constitution provides:

"No law shall embrace more than one object, which shall be expressed in its title."

The title of this Act is "An Act to amend and re-enact Section 30 of Chapter V of an Act, entitled 'An Act Concerning Corporations, which became a law on the 21st day of May, 1903.' "

Said section 30 proposed to be amended reads:

"All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall, nevertheless, be continued for such length of time as may be necessary from such dissolution or expiration for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business; to dispose of and convey their property, and to divide their capital; but not for the purpose of continuing the business for which said corporation shall have been established."

The amendment of this section is to insert after the word "necessary" the words "not exceeding three years," and to add "if the affairs of any such corporation shall not be wound up by its directors within three years from such dissolution or expiration they shall be wound up in the manner provided by section 32 of this act." These two amendments cover all that was purported in the title, but preceding this section as amended is a page authorizing any corporation to dissolve at will. The purpose of this page is neither expressed nor hinted at in the title to the Act, and following section 30 as amended is nearly two pages of matter authorizing after the expiration of three years said corporation to apply for and obtain a new charter. This purpose is neither expressed nor hinted in the title to the Act.

It seems to me that the embodying of these three distinct objects, only one of which is expressed in the title, is in direct con-

flict with section 52, of the Constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title.

Chapter 370, Acts of Assembly 1902-'3-'4, "An Act Concerning Corporations," provides in Chapter I how any number of persons not less than three, may under the provisions and subject to the requirements of this Act associate to establish a corporation for the transaction of any lawful business, except a railroad company, etc., or other company which shall need to possess the right of eminent domain for the purpose of taking and condemning lands within this State. The Act sets out in fourteen sections the provisions and requirements, and in the eleventh section makes a provision how such a business corporation not possessing the right of eminent domain may dissolve. This eleventh section is imported bodily into the so-called Act under discussion to amend section 30 of Chapter V.

Chapter II of the said "Act Concerning Corporations" provides how any number of persons, not less than seven, may form a corporation for the purpose of purchasing, at any sale under decree of any court of this State, other State, or the United States, or at any foreclosure sale under deed of trust or mortgage, leasing or constructing, and of maintaining and operating a railroad or railroads, to be operated with any kind of motive power, and to be used as a common carrier in the conveyance of persons or property, or both; and for that purpose may make and sign articles of association, in lieu of a certificate of incorporation heretofore, in chapter one of this act, authorized.

Said Chapter II contains twelve sections setting out the provisions and requirements under which said seven or more persons may buy, lease, construct, maintain and operate a railroad. But in none of these twelve sections is there any provision for dissolution.

Chapter III of said Act provides for the incorporation of public service corporations other than railroads. The effect of the Act of 1906, amending section 30 to Chapter V, it is claimed extends to public service corporations, whether chartered in pursuance of the provisions of Chapter II or Chapter III, the same provision provided in Chapter I by which ordinary business corporations can dissolve themselves at will. If the Legislature of 1906 had intended to extend this provision to public service corporations the natural and necessary procedure would have been to have amended Chapters II and III.

A railroad corporation granted the right of eminent domain could only obtain its charter in pursuance of the requirements of Chapter II. One of the most important provisions is clause d of section 1 of said Chapter II, in which the applicant for

the charter declares "the period, if any, limited for the duration of the corporation." Practically all charters for steam railroads have been taken out for an unlimited period.

Upon the faith of the declaration of purpose to construct and operate the railroad as a State highway for an unlimited period the State agrees to allow the railroad company to avail itself of the power of eminent domain. Upon the faith of unlimited duration and operation the bonds of the railroad company are sold. Upon this undertaking of unlimited operation farms near the railroad are bought and improved; industries, such as dairies, mill operations, and others, are established, and cities and towns built up along the line of the railroad. The undertaking of the private parties who apply for the charter is to operate a state highway and to conduct a business affected with the public use for an unlimited time and without any right to dissolve at will claimed or accorded prior to the Act of Assembly of 1906. Some such ventures have proved highly profitable. Some have been wrecked by mismanagement. Some have proved unprofitable. Where they became practically insolvent the mortgage holders could have them sold by proceedings in court. In such proceedings the court might appoint a receiver, who, under the orders of the court, could, and generally did, run the road, preserving it as a going concern until there be a sale and reorganization by parties willing to keep the road in operation. In a word, except where the corporation expired by limitation, the whole business was managed according to the principles established by experience and exercised by the courts under their common law power.

I am aware that the Supreme Court of Virginia in construing section 52 of the Constitution, which reads: "No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be re-enacted and published at length," has decided, in Kelly *v.* Gwatkin, 108 Va. 6, that the provision of the Constitution of 1869 that no act shall embrace more than one object, which shall be expressed in its title, "is not applicable to sections of the Code, but is aimed at separate acts, in their original enactment, where the opportunity exists for the evils which the Constitution was designed to prevent or defeat."

And it has also been decided in Bertram *v.* Commonwealth, 108 Va. 902:

"The title of an act amending the Code of 1887 is sufficient if it refers to the chapter and sections to be amended, and the body of the amendatory act is within its title if it is germane to the subject of the chapter referred to in the title."

But this Act of 1906 under consideration is not an amend-

ment of the section of the Code. On the contrary it is an amendment of an Act of Assembly, and the Court says in Kelly *v.* Gwatkin, supra, that the Constitutional provision that "no act shall embrace more than one object, which shall be expressed in its title, is aimed at separate acts in their original enactment, where the opportunity exists for the evils which the Constitution was designed to prevent or defeat."

Both the quoted decisions follow and affirm the opinion of Judge Riley, delivered in Iverson Brown's case, 91 Va. 762, 21 S. E. 357.

In Terry Clerk *v.* Mayre, Auditor, 100 Va. 40, the Court held:

"The title of an act will be sufficient within the meaning of section 15, Article V of the Constitution, if the things authorized to be done, though of a diverse nature, may be fairly regarded as in furtherance of the object expressed in the title. It is not required that the title shall be an index of the act.

An act which defines what duties are to be performed by an officer in consideration of the salary given to him by the act, and which imposes upon him duties theretofore discharged by another officer, and provides that the latter shall no longer do the work or receive the compensation therefor, is sufficiently embraced within a title to regulate the salary of the first named officer."

Section 30 of Chapter V of the "Act Concerning Corporations," Acts of 1902-'3-'4, applied only to business corporations chartered under Chapter I of said Act, while the proposed amendment of the Act of 1906, claimed to allow public service corporations to dissolve at will, is not congruous, has no natural connection with, and is not germane to the object expressed in the title.

The so-called amendment to section 30 of Chapter V reverses the whole policy of the State, and puts it in the power of any public service corporation, whether confined to the limits of the State or extending beyond the limits of the State, without notice to the public and without notice to the State, to dissolve any day it sees fit and forthwith cease operation, and it is claimed that the State Corporation, acting merely in a ministerial capacity, shall, at the demand of the corporation, write up the record and issue the certificate of dissolution. If this be so, does not this law provide for an interference with interstate commerce and therefore in conflict with the Constitution of the United States?

For the reasons stated above, it appears that this Act purporting to amend section 30 of Chapter V of the "Act Concerning Corporations" is unconstitutional and *ab initio* null and void.

[15] Has this Commission the power to declare an Act unconstitutional? In Commonwealth *v.* Atlantic Coast Line Rail-

way Company, 106 Va. 61, Judge Cardwell, who rendered the opinion of the Court, says:

"The learned Attorney-General, as the highest law officer of the Commonwealth, urged upon the Commission that in this proceeding it was invested with all the powers, and had imposed upon it all the responsibility, of a court of record. He earnestly contended that the Commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the Attorney-General was not combatted by the learned counsel for the defendant company, but was conceded to be correct. Indeed it is no longer open to question. 'In this Commonwealth, the State Corporation Commission, created by constitutional authority, is the instrumentality through which the State exercises its governmental powers for the regulation and control of public service corporations. For these purposes, it has been clothed with legislative, judicial and executive powers,' was held by the Court of Appeals of this State in the case of Norfolk & P. R. R. Co. *v.* Com., 103 Va. 289, 49 S. E. 39, which went up to that Court on appeal from the Commission."

[14] For the reasons stated, I am led to the conclusion therefore that the said act purporting to amend section 30 of Chapter V of the "Act Concerning Corporations," which became a law May 31, 1903, is unconstitutional, void and of no effect; because, 1st. If it be construed in the manner urged upon us the effect of it will be to take away from the State Corporation Commission all effective power for the regulation and control of public service corporations; 2nd. Because it can be used to conflict with the commerce clause of the Constitution of the United States. 3rd. Because it reverses completely the policy of the State in regard to continued operation of railroad corporations for the benefit of the public. 4th. Because it is in direct conflict with the provision of the Constitution of Virginia that no law shall embrace more than one object, which shall be expressed in its title.

I fully concur with the Chairman in his conclusion and approve the order which refuses the application of the Tidewater and Western Railway Company for a certificate of dissolution.

**Editor's Note.**—An appeal was granted by the Supreme Court of Appeals from the order of the Corporation Commission in the above case, and it was argued at the Wytheville Term just ended but no decision has been rendered as yet. It is confidently expected, however, that the decision of the Corporation Commission will be sustained for it would be a serious public danger if public service corporations were allowed to dissolve without the permission of the Corporation Commission, after notice to the public and a full and

This case was commented on editorially

B. S.